SUPREME COURT

OF THE UNITED STATES

October Term
1974

No. 74-1346

DUNCAN SCOTT MACKENZIE and
RICHARD STEVEN BONDAR,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. The decision of the Court below cannot be reconciled with the decisions of the Supreme Court in **Coolidge v. New Hampshire, 493 U.S. 443**; and in **Preston v. United States, 376 U.S. 364**; and has so extended the rule of **Chambers v. Maroney, 399 U.S. 42** that fourth amendment protection virtually disappears in the presence of an automobile.

II. The Court below has misused the doctrine of "founded suspicion" to abrogate appellant's rights under **Miranda v. Arizona, 383 U.S. 436.**

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III. The statutes under which petitioners were convicted are unconstitutional.

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SUPREME COURT
OF THE UNITED STATES

DUNCAN SCOTT MACKENZIE and
RICHARD STEVEN BONDAR, Petitioners
v.
UNITED STATES OF AMERICA, Respondent

Petitioners, DUNCAN SCOTT MACKENZIE and RICHARD STEVEN BONDAR, by their counsel Robert W. Fraser and Samuel Frizell, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit as that judgment affirms their guilt of possession of marijuana with intent to distribute, in violation of Title 21 U.S.C. Section 841 (a)(1) and conspiracy to possess marijuana with intent to distribute in violation of Title 21 U.S.C. Section 846.

PROCEEDINGS BELOW

In a memorandum decision, a copy of which is attached as Appendix A, pages 31-34, petitioners' convictions were affirmed.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Is the warrantless search of an automobile valid in the absence of a showing that it was impractical to obtain a search warrant?

2. Can an arrested suspect be interrogated without a Miranda warning when officers have probable cause to believe the suspect unlawfully possesses marijuana at the time of the interrogation?

3. Are the statutes under which Petitioners were convicted constitutional?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case:

United States Constitution, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 21, U.S.C. Section 841 [a][1][2]:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Title 21, U.S.C. Section 846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commision of which was the object of the attempt or conspiracy.

Title 28, U.S.C. Section 1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or ciminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

PROCEDURAL HISTORY

This is a criminal prosecution for violations of 21 USC§841 (a) (1), possession with intent to distribute marijuana and 21 USC §846, conspiracy to possess with intent to distribute marijuana. The overt act alleged was that appellant MACKENZIE drove a vehicle in the southern district of California. (Clerk's Transcript page 1 — hereafter the clerk's transcript will be abbreviated to C.T.).

Appellants were arrested on January 25, 1974 and indicted on February 6, 1974 in the southern district of California.

Appellants were duly arraigned (C.T. 4), discovery proceedings were completed (C.T. 8), and appellants moved the Court for an order suppressing evidence seized from a 1968 Chevrolet driven by appellant MACKENZIE, to suppress observations made by government agents of the vehicle from and at the time it was stopped; and of items seized from a 1959 Chevrolet Apache driven by appellant BONDAR (C.T. 15). The motion to suppress was made on the grounds that the searches and seizures were made without judicial warrants and were unreasonable within the meaning of the Fourth Amendment to the United States Constitution. The motion was heard by the Court on Monday, May 6, 1974, and denied (C.T. 40).

The case was called for trial on June 20, 1974; a jury was chosen and sworn; and heard testimony though June 20 and June 21, 1974 (C.T. 55). A motion for acquittal was made and denied at close of appellants' case (Reporter's Transcript pages 219-221 — hereafter the Reporter's Transcript will be abbreviated to R.T.). On June 24, 1974 the jury returned a verdict of guilty on both counts against both appellants (C.T. 86). A motion in arrest of judgment was made on grounds the statute was unconstitutional (C.T. 88) which was denied. Notice of appeal was duly filed and perfected (C.T. 94). Appellant MACKENZIE was sentenced to two years in prison (C.T. 93), and appellant BONDAR committed under the Youth Correction Act (C.T. 93). Both appellants were released on bail. The transcript on appeal was duly transmitted to the Ninth Circuit Court of Appeals, docketed, and briefs filed. The Court of Appeals refused argument and submitted the case. It's memorandum decision issued on March 25, 1975, affirming the judgments.

STATEMENT OF THE FACTS

On January 25, 1974 John R. Pulley, a Special Agent for the Federal Drug Enforcement Administration, was working his duty station in Calexico, California (R.T. 80-81). While northbound on Heber Avenue in Calexico, California, Pulley's attention was drawn to a 1968 Chevrolet Impala, four door hardtop, black over yellow, California License WXK 949 because the vehicle was

sitting a little lower in the rear than he thought it should and the rear tires appeared to be bulging on the sidewalls (R.T. 82-83). The vehicle was approximately two and one half blocks from the Mexican border facing southbound on Heber (R.T. 83). Pulley looked in the vehicle and could see no personal belongings or anything other than the motor vehicle registration receipt which was in the open glove compartment (R.T. 84).

The doors were locked and the suspension of the vehicle was "beefed up" with air suspension type shock absorbers (R.T. 85-86). Pulley established a surveillance of the vehicle at about 11:30 A.M. (R.T. 86) and during this surveillance noticed a Mexican female approach the vehicle at approximately 12:10 P.M. (R.T. 87) and about twenty minutes later remove a parking ticket under the windshield wiper of the vehicle (R.T. 88). Two or three minutes later she rode by as a passenger in a 1974 Mustang with Baja California license plates (R.T. 87-88).

There were two other Drug Enforcement Administration units in the area, who observed the Mustang until it crossed into Mexico (R.T. 89).

Special Agent Walker relieved Pulley at about 2:00 P.M. so Pulley could get lunch (R.T. 90). Pulley remained on his surveillance until approximately 6:50 P.M. at which time he drove to his office and was having a cup of coffee some seven blocks away (R.T. 90). At about 7:00 P.M. Pulley received information that there was activity at

the subject vehicle (R.T. 90) at which time he returned. When Pulley returned the vehicle was at Second Avenue westbound, crossing the intersection of Holland, and Pulley began following the vehicle (R.T. 93). The vehicle proceeded until it reached Highway 98, approximately twelve blocks away from where Pulley began following it. During his pursuit of the subject vehicle he noticed another vehicle, a 1968 Chevrolet Panel Truck, proceeding in the same direction as the subject vehicle (R.T. 95-96). Pulley pulled in behind the panel truck in the left turn lane from northbound Imperial Avenue onto Highway 98 and saw the driver look in his rearview mirror (R.T. 97). Pulley pulled slightly to the right so that he was not visible to the side rearview mirror and saw the driver of the panel truck look up towards his rearview mirror (R.T. 98). At the time Pulley was following the subject vehicle there were four other units in the area — all of whom took up the pursuit (R.T. 98). In addition to the ground units there was an aircraft carrying Special Agent Pettingill (R.T. 99). Pulley advised Pettingill that he was going to make a left turn on a particular road and that the third vehicle in front of him would be the panel truck. Pulley made his left turn off of Highway 98 (R.T. 100).

Pettingill was an observer in the aircraft flying over the area and did see a vehicle make a left turn onto Clark Road. He, by radio, requested another agent, one Polish, to hit his brake lights several times (R.T. 198). The

vehicles were westbound on Highway 98 in light to moderate traffic (R.T. 198). Approximately twenty miles out of Calexico on Highway 98 Pettingill observed the second vehicle which was the subject of this surveillance (the panel truck) to hit the high beams on his headlights about twice at a time when the two suspect vehicles were seventy-five to one hundred yards apart. He saw no vehicles at that point coming from the eastern direction towards the vehicles he was watching (R.T. 199). Signals from the agents' vehicles to the plane were also given by flashing the agents' vehicles bright lights (R.T. 212).

The plane in which Pettingill was riding travelled approximately one hundred and twenty miles per hour, going approximately twice the speed of the ground vehicles (R.T. 202). The plane orbited the vehicles in a clockwise direction for approximately twenty minutes (R.T. 202). The aircraft from which Pettingill was making his observations was about five thousand feet in altitude (R.T. 205).

After making the left turn off the highway, Agent Pulley picked up Deputy Wallace of the Imperial County Sheriff's Department and then continued in a westerly direction on Highway 98. Pulley ordered the agents involved in the surveillance to stop the vehicles if they continued westbound on Interstate 8. Accordingly, both vehicles were stopped when they got on Interstate 8 westbound; Pulley stopping the 1968 Chevrolet with his red light and

siren (R.T. 102) and some of the other agents stopping the panel truck which passed the Chevrolet automobile and went on down the road (R.T. 103). Appellant MACKENZIE was driving the 1968 Chevrolet (R.T. 104). Pulley displayed his badge, stated he was a federal agent, asked MACKENZIE to step out of the vehicle, asked him whose car it was, and asked if he had contraband on the truck. MACKENZIE said the vehicle was a friend's and that he had no countraband and refused the request to search the truck (R.T. 104). Pulley then removed the keys from the ignition, opened the trunk, and observed that the trunk was completely full of packages which, in his opinion, contained marijuana (R.T. 105). There were two hundred eighty-six kilogram packages, of which ten were retained and entered into evidence as Government's Exhibit No. 2 (R.T. 106). In the Calexico area a kilogram of marijuana in a large quantity would sell for eighty to one hundred dollars, and the price would increase the further one got from the border (R.T. 107). The marijuana is usually broken into small packages called a baggy or lid weighing approximately one ounce prior to being used (R.T. 108).

Agent Walker brought Appellant BONDAR from the stopped panel truck back to the 1968 Chevrolet (R.T. 109).

Deputy Camarena of the Imperial County Sheriff's Office returned the 1968 Chevrolet back to the DEA Office in Calexico where the marijuana was unloaded, counted,

marked, initialed and boxed (R.T. 110).

Under cross-examination Agent Pulley stated that he could see nothing in the trunk compartment by looking through the windows of the car as it was parked on the street (R.T. 116).

Pulley also testified on cross-examination that he was familiar with the smell of marijuana, but that he could not smell any around the car nor could he smell marijuana by sniffing at a partially opened window (R.T. 137) as it was parked in Calexico. He further testified that the automobile had come across the border at 10:07 on that morning (R.T. 125). The government sought to present evidence that Agent Pulley obtained the assistance of a specially trained dog, which indicated by pawing at the trunk of the car that marijuana was contained therein. The Court refused to permit this evidence to be presented to the jury (R.T. 128-129). The subject 1968 Chevrolet was registered to a man named Donald E. Martin in Huntington Beach (R.T. 114). The wrappers from the marijuana that was taken from the trunk were submitted for fingerprint analysis at the FBI Fingerprint Identify Bureau in Washington, D.C. (R.T. 133), but neither of the Appellants' fingerprints were found upon the wrappers (R.T. 216).

Agent Walker of the Drug Enforcement Administration also worked in Calexico, California (R.T. 143). He assisted Agent Pulley on the surveillance of the 1968

Chevrolet, beginning at about 12 noon (R.T. 144). Walker also was on surveillance of the vehicle at 7 P.M. on January 25, 1974. He had relieved Agent Pulley, and Pulley had gone back to the office (R.T. 146). At about 7 P.M. Appellant MACKENZIE approached the driver's side of the automobile, entered the vehicle and drove south to Second Street then proceeded west on Second toward Imperial (R.T. 146-147). Walker was one of several cars following MACKENZIE (R.T. 147). Walker had first seen the Chevrolet Panel Truck, driven by Appellant BONDAR, in Calexico, northbound on Imperial Avenue. The 1968 Chevrolet was in front of the panel truck as they were northbound on Imperial.

Walker using his red light and sirens stopped the panel truck on Interstate 8 immediately after the 1968 Chevrolet driven by the Appellant MACKENZIE was stopped (R.T. 148). Walker identified himself as a Federal Narcotics Agent to Appellant BONDAR, told him he was conducting a narcotics investigation (R.T. 149) and asked him "who his friend was in the vehicle just to the east" (R.T. 153). Objection was made at this point on the grounds that Appellant BONDAR had not been advised nor had he waived his rights set forth by the United States Supreme Court in **Miranda v. Arizona** (R.T. 150). This objection was overruled and Walker testified that Appellant BONDAR replied that he "didn't have any friend or denied any knowledge of knowing anyone in the

vehicle" (R.T. 153). Appellant BONDAR was taken back to the other vehicle where Agent Pulley placed him under arrest (R.T. 153).

Appellant BONDAR's vehicle, the panel truck, was searched in Calexico after it was returned to the DEA Offices there. Certain documents, letters addressed to Appellant MACKENZIE, (Government Exhibits 3, 4, and 5) were found in the BONDAR vehicle (R.T. 154). Admission of these items in evidence was objected to, but the objection was overruled (R.T. 155 and 160).

When Appellant MACKENZIE first approached the car, he did not open the trunk, nor did he look at the shock absorbers (R.T. 162). Agent Walker had watched the car off and on from noon until 7:00 P.M., and on one occasion sniffed at the partially opened window and smelled nothing unusual (R.T. 164). Walker did know what marijuana smelled like (R.T. 164).

Agent Walker testified that from the time he turned on his red light and his siren, just prior to stopping the panel truck, that Appellant BONDAR was not free to proceed as he wished (R.T. 176). The panel truck was given a cursory search on the highway at the location where it was stopped for any obvious contraband or possible weapons. An hour to an hour and fifteen minutes later after it had been taken back to the DEA Office the vehicle was thoroughly searched. No weapon or no countraband was ever found in the vehicle (R.T. 177). BONDAR was

placed under arrest by Agent Pulley within a few minutes after the vehicle stop was made (R.T. 178). At the time BONDAR was stopped, he was a suspect according to Agent Walker (R.T. 183).

Deputy Sheriff Camarena of the Imperial County Sheriff's Department was riding with Agent Pulley in his vehicle (R.T. 185). He saw the kilo bricks of marijuana in the trunk of the 1968 Chevrolet, and drove the vehicle approximately thirty-five miles back to Calexico. He described it as riding very hard, and having steering that was lighter than normal (R.T. 186). He testified that he noticed a smell of unburned marijuana while inside the automobile (R.T. 187).

The parties all stipulated that the bricks found in the trunk of the 1968 Chevrolet were in fact marijuana and that the bricks which were the subject of Government's Exhibit 2 remained in the custody of the United States since their seizure by Agent Pulley until they were presented as evidence to the Court. (R.T. 217).

With this evidence the government rested and motions for judgment of acquittal were made by both appellants (R.T. 219-220). Both motions were denied (R.T. 221).

The defense consisted primarily of character witnesses concerning Appellant MACKENZIE's character. In addition to the character witnesses, Mr. Tom Shea-han testified than he saw Appellants in Elsinore at approximately 10:00 A.M. on January 25, 1974, at the

time the load vehicle was crossing the border (R.T. 237-238). A motion to strike this evidence as irrelevant and prejudicial to Appellant BONDAR was made and denied (R.T. 240).

The Court took judicial notice that the distance from Elsinore to Calexico was between one hundred and fifty and two hundred miles (R.T. 270).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT BELOW CANNOT BE RECONCILED WITH THE DECISIONS OF THE SUPREME COURT IN COOLIDGE v. NEW HAMPSHIRE, 493 U.S. 443; AND IN PRESTON V. UNITED STATES, 376 U.S. 364; AND HAS SO EXTENDED THE RULE OF CHAMBERS V. MARONEY, 399 U.S. 42 THAT FOURTH AMENDMENT PROTECTION VIRTUALLY DISAPPEARS IN THE PRESENCE OF AN AUTOMOBILE.

Although the Supreme Court has held that the word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears, there is a long line of cases in the Ninth Circuit cited by the United States in its brief to the Court of Appeals which essentially holds just that. This line of cases is exemplified by **United States v. Church,** 490 F. 2d 353 in which a warrantless search of an automobile was sustained even though it occurred approximately four and one-half hours after federal agents initiated surveillance and even though a U. S. Magistrate's office was only one block away. This same theory pervades the holdings in **United States v. Sherman,** 430 F. 2d 1402 where a warrantless search was sustained though agents had

twelve hours in which to procure a search warrant, and in **United States v. Cohn,** 472 F. 2d 29 in which a warrantless search of a vehicle was upheld after a nineteen hour vigil.

In the case now before the Court, federal agents established surveillance of the MACKENZIE vehicle, at 11 a.m. in the morning where it was parked on the streets of Calexico, California. The surveilling agent had full time assistance of another agent from and after 2 P.M. and the vehicle was not driven away until 7 P.M. A United States Magistrate was located in El Centro, a distance of some ten miles from Calexico, and a California Magistrate empowered to issue a search warrant was located in Calexico itself. The agents actually engaged in the surveillance also had several other agents with cars in the vicinity, and were able to call on Sheriff's Deputies with cars and airplanes when needed. There was simply no evidence presented to the Court to create a factual exception to the Fourth Amendment requirements that a search warrant be obtained before a search.

This Court in **Coolidge v. New Hampshire,** 403 U.S. 443 held:

> "Thus the most basic constitutional rule in this area is that searches conducted outside the judicial process without prior approval by judge or magistrate, are **per se** unreasonable under the Fourth Amendment — Subject only to a few specifically Established and well delineated exceptions." 403 U.S. at 454-5; 91 S. Ct. at 2032)

The burden is upon the government to show exigent circumstances which would justify the failure to obtain a warrant. There is not a scintilla of evidence in the record which justifies this failure. The agents had the necessary probably cause to search 8 hours prior to the search and there were at least two agents involved in the full time surveillance of the subject vehicle for a period of five hours as it was parked on the streets of Calexico. There were two magistrates within minutes away, and no showing was made that it was impractical to obtain a search warrant from one of these magistrates.

The holding in **Chambers v. Maroney,** 399 U.S. 42; 90 S. Ct. 1975 is illustrative of a permissible warrantless search:

> ". . . . . exigent circumstances justify the warrantless search of an automobile stopped on the highway where there is probably cause, because the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. The opportunity to search is fleeting."

The only similarity in the case now before the Court and that before the Court in **Chambers v. Maroney, supra,** is the fact that an automobile is involved. The opportunity to search the MACKENZIE vehicle in the case now before

the Court was not fleeting. This opportunity existed for at least eight hours prior to the time the vehicle was moved by appellant MACKENZIE.

The record reflects a callous denial of Fourth Amendment rights to appellants. The federal agents involved were able to get relief from the surveillance in order to get lunch, and later to get coffee, but they could not find the necessary time to comply with the Fourth Amendment and get a search warrant.

With the exception of the word "automobile" there is nothing in the record to excuse this warrantless search and appellants submit that, under the line of cases cited by the government, the word "automobile" truly is a talisman in whose presence Fourth Amendment rights totally dissipate.

The search of the BONDAR vehicle is even less constitutionally defensible than the search of the MACKENZIE vehicle. In MACKENZIE, at least, the officers had some evidence that the vehicle contained contraband. The circumstances surrounding it's appearance and the indication shown by Rex, the local marijuana sniffing dog, could, **arguendo,** give the officers probable cause for believing that the MACKENZIE vehicle contained contraband.

However, when the BONDAR vehicle was stopped on the highway and its driver arrested, the officers had no evidence whatsoever, either objective or subjective, that

the vehicle contrained any contraband or any other item susceptible of seizure. After BONDAR's arrest, his vehicle was driven some thirty miles back to the DEA Offices before it was searched. This activity is forbidden by the holding in **Preston v. United States,** 376 U.S. 364; 84 S. Ct. 881. The Court of Appeals held that **Preston, supra,** was not applicable to the BONDAR vehicle search because **Preston** applied only to attempts to justify a search as incident to an arrest. The Court of Appeals held that in this case the Trial Court upheld the search because it found the officers had probably cause to search the vehicle at the time they arrested BONDAR. Yet, the record is devoid of any evidence whatsoever of probably cause that the vehicle contained any seizable items of contraband or other instrumentalities of crime. If the officers can justify the search of the BONDAR vehicle at all it must be justified on the grounds that it was searched as an incident of BONDAR's arrest. And if this is justification, then the search was barred by the holding in **Preston v. United States, supra.** The search cannot be justified by **Cady v. Dombrowski,** 413 U.S. 433; 93 S. Ct. 2523, as this was not a caretaking search by state officers, but a search for evidence.

II

THE COURT BELOW HAS MISUSED THE DOCTRINE OF "FOUNDED SUSPICION" TO ABROGATE APPELLANT'S RIGHTS UNDER MIRANDA V. ARIZONA, 384 U.S. 436.

The Ninth Circuit utilizes a doctrine known as "Founded Suspicion" to permit the stopping of vehicles for investigation without probable cause. The Court dismissed appellants' argument that their statements should not have been admitted into evidence because they were not warned pursuant to **Miranda, supra,** with the following language:

> "It appears that they argue that the whole panopoy of warnings required by that case (Miranda) should be applied whenever an investigation has 'focused' sufficiently to justify stopping a vehicle. They cite no authority for this novel proposition, and we see no reason to adopt it. See **Lowe v. United States,** 407 F. 2d 1391, 1393-94 (Ninth Circuit 1969)."

Assuming, **arguendo,** that Miranda warnings are not required when a vehicle is stopped pursuant to a "Founded Suspicion". this rule would have no application to this case. The Court below held that the agents had probable cause not only to stop the vehicles but to search the vehicles. **Henry v. United States,** 361 U.S. 98; 80 S. Ct. 168 held:

> "The fact that the suspects were in an auto- is not enough. **Carroll v. United States, supra,** liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause." (361 U.S. at 104; 80 S. Ct. at 172)

The necessary probable cause to justify the search would only exist where the facts and circumstances within the searching officers knowledge were sufficient within themselves to warn a man of reasonable caution in the belief that an offense has been or is being committed or that contraband was contained in the MACKENZIE

The necessary probable cause to justify the search would only exist where the facts and circumstances within the searching officers knowledge were sufficient within themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed or that contraband was contained in the vehicle (**Brinegar v. United States,** 338 U.S. 160; 69 S. Ct. 1302).

When the agenst stopped BONDAR and MACKENZIE they either had probable cause to believe MACKENZIE was carrying marijuana and that an offense was being committed or they had no justification for searching

either of the vehicles. The Court below did hold that they had probable cause for searching the vehicles and it is totally inconsistent to hold that the Miranda warnings were not required.

It is very clear that the two appellants were undergoing custodial interrogation.

As is stated in **Henry v. United States,** 361 U.S. 98; 80 S. Ct. 168:

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for the purposes of this case, was complete." (361 U.S. at 103; S. Ct. at 171)

After appellants were stopped on the highway, not free to go, by federal officers who had probable cause to believe that they were transporting marijuana, they were questioned and their answers were put into evidence. This violates the holding of **Miranda v. State of Arizona,** 384 U.S. 436; 86 S. Ct. 1602:

> ". . . The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of a defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege of self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." (384 U.S. at 444; 86 S. Ct. at 1612)

By inconsistent holdings that the officers on the one hand had probable cause to justify a search for contraband and on the other hand to hold that the investigation had not focused sufficiently to require the Miranda warnings, the Court below effectively negates Miranda as applied to interrogation of vehicle drivers. Like the Fourth Amendment, the Fifth Amendment does not fade away and disappear in the presence of the word "automobile".

III

THE STATUTES UNDER WHICH PETITIONERS WERE CONVICTED ARE UNCONSTITUTIONAL.

One of the most familiar phrases in jurisprudence is "Ignorance of the law is no excuse". However, this maxim does have its exceptions and can no longer be viable on its common law basis as to acts which purely **malum prohibitum.**

The doctrine that ignorance of the law is no excuse developed early in the history of the English common law when all crimes were **mala in se.** Even after the body of criminal law developed statutory offenses which were **malum prohibitum** the presumption that everyone knew the law still had a grain of truth to it. As is stated by the Supreme Court of North Carolina in 1849 in the case of **State v. Boyett,** 32 N.C. 336:

> ". . . In criminal matters the presumption most usually accords with the truth. As to such as are **mala in se** everyone has an innate sense of right and wrong which enables him to know when he violates the law, and it is of no consequence if he be not able to give the name by which the offense is known in the law books, or to point out the nice distinctions between the different grades of offense. As to such as are **mala prohibita** they depend upon statutes printed and published and put within the reach of everyone; so no one has a right to complain if a presumption necessary to the administration of law is applied to him."

As the Court spoke in 1849 it was probably true that the statutory law was put within the reach of everyone. The body of law was extremely small at that time, compared with the vast proliferation of the statutes surrounding us at the present time.

There are cases in American jurisprudence which hold that in some circumstances knowledge that an act is **malum prohibitum** is a prerequisite for conviction. The Supreme Court of Massachusetts in 1935, in the case of **Commonwealth v. Benesch,** 290 Mass. 125; 194 N.E. 905 stated in resolving a case involving the Blue Sky Laws:

> "So long as the contracts had not beden approved, a sale of the shares was **malum pro-**

hibitum because of the statute, and nothing more. While no decision is this commonwealth directly in point has been called to our attention, it has been held by excellent authority in other jurisdictions that in order to sustain an indictment for conspiracy to commit an offense which, like that here involved, is **malum prohibitum** only, belonging to a general type of offenses which has been greatly expanded by modern legislature in many fields, it must appear that the defendant knew of the illegal element involved in that which the combination intended to accomplish. **People v. Powell,** 63 N.Y. 88; **Landon v. United States,** 299 Fed. 75. See, **Welch v. Adams,** 114 Mass. 323; **Vogel v. Brown,** 201 Mass. 261; 87 N.E. 686; **People v. Flack,** 125 N.Y. 324; 26 N.E. 267. We believe this is sound law when the charge is conspiracy."

Furthermore, the Supreme Court in **Lambert v. California,** (1957) 355 U.S. 225; 78 S. Ct. 240 held unconstitutional a registration statute of the Los Angeles Municipal Code:

> "We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. . . . . Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."

Under the current state of the law, a citizen of Oregon commits only an infraction when he posseses one ounce or less of marijuana. This will probably be true in California as of January 1, 1976. This same citizen would, by the same act, be committing a federal felony. There are none of the usual indicia of a federal offense involved: No traffic over state lines, no communication over state lines, no contact with a federally insured institution. The act involved is purely local and may be only an infraction of the state law. There is no requirement in the law itself that the unsuspecting citizen be aware of the existence of the federal law. Making such a morally innocent act felonious with no requirement of knowledge does not comport with due process.

Petitioners submit that with such a law as they are charged with violating there should be a requirement of

publication and a showing that they either knew or should have known that their **malum prohibitum** act was illegal.

CONCLUSION

Based on the foregoing argument and authorities it is respectfully suggested to the court that the questions are of widespread and general importance which have not been, but should be, decided by this Court. It is further suggested that the decision of the Court of Appeals is in conflict with applicable decisions of other circuits, and has so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision. For those reasons, it is respectfully suggested that the Court should grant its Writ of Certiorari to the Court of Appeals for the Ninth Circuit and reverse the judgment of that court.

Respectfully submitted,

ROBERT W. FRASER AND
SAMUEL FRIZELL

by:

SAMUEL FRIZELL
Attorneys for Petitioner

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DUNCAN SCOTT MACKENZIE, *Defendant-Appellant.*	No. 74-3031
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RICHARD STEVEN BONDAR, *Defendant-Appellant.*	No. 74-3032

MEMORANDUM

[March 25, 1975]

Appeal from the United States District Court
for the Southern District of California

Before: BROWNING and WRIGHT, Circuit Judges, and ZIRPOLI,* District Judge.

Duncan Scott MacKenzie and Richard Steven Bondar appeal from their convictions, after jury trial, of possession of 629 pounds of marijuana with intent to distribute and conspiracy to possess the marijuana in violation of 21 U.S.C. sections 841(a)(1); 846. They raise six issues on appeal. We affirm.

Appellants first argue that the searches of their respective vehicles were made without probable cause. At the hearing on the

*Honorable Alfonso J. Zirpoli, United States District Judge for the Northern District of California, sitting by designation.

motion to suppress the marijuana, after receiving testimony from several law enforcement officers and from appellant Bondar, the trial court concluded that the officers had probable cause to search both vehicles. The agent who stopped and searched the Chevrolet MacKenzie was driving testified that he first saw it parked in a notorious "drop" area near the border with Mexico in Calexico, California. He noticed that it had special air suspension shock absorbers similar to those often used on "load" cars to transport marijuana and that, despite these special shock absorbers, it was sitting low in the back and its rear tires, although new, were bulging. He therefore obtained the services of Rex, the local marijuana-sniffing dog, which signalled that there was marijuana in the trunk of the car. He thereupon decided to watch the car. Several hours later, appellant MacKenzie got into the Chevrolet and drove toward the interstate highway leading out of town. The agent, along with other officers assisting in following the Chevrolet, then observed that the car was travelling in tandem with a van, which he testified was a common *modus operandi* of drug smugglers. The officers observed the cars travelling in this tandem arrangement for some 35 miles, usually only 100 yards apart and never more than one-quarter mile apart. While so following both vehicles they were informed that the van had once flashed its headlights several times when there was no traffic approaching, as if to signal the other vehicle. They stopped both vehicles, searched the trunk of the Chevrolet, found the marijuana, and arrested both MacKenzie and Bondar, who was driving the van. Viewing the evidence in the light most favorable to the appellee, as we must, there is no question that the trial court's finding that there was probable cause to search the MacKenzie vehicle was not clearly erroneous. See *United States v. Patterson*, 492 F.2d 995 (9th Cir. 1974). While the search of the Bondar vehicle presented a close question, given the tandem arrangement, signalling and the discovery of the marijuana, which confirmed the officers' suspicions, the trial court was not clearly in error in finding they had probable cause to search the van.

Appellants' second argument is that the officers should have obtained warrants before searching the vehicles. The government relies upon the automobile exception to the warrant requirement. See *Carroll v. United States*, 267 U.S. 132 (1925). The trial court found the agent's failure to obtain a warrant to search the Chevro-

let during the several hours between the time he first observed it and the time MacKenzie drove it away was justified; we see no reason to overturn this finding. See *United States v. Church*, 490 F.2d 353 (9th Cir. 1974). Bondar argues that the warrantless search of the van is not justified since the officers had taken him into custody and driven the van back to their offices prior to searching it, relying on *Preston v. United States*, 376 U.S. 364 (1964). But *Preston* applies only to attempts to justify a search as incident to an arrest. *Cady v. Dombrowski*, 413 U.S. 433, 444 (1973). Here, the trial court did not uphold the search because it was incident to an arrest. Rather, it found that the officers had probable cause to search the vehicle at the time they arrested Bondar. Thus, under the doctrine of *Chambers v. Maroney*, 399 U.S. 42 (1970), they were permitted to defer their search to a more convenient time. See also Coolidge v. New Hampshire, 403 U.S. 443, 463 (1971).

Third, appellants argue that admission of their answers to various initial inquiries the officers made of them when they stopped them violated their rights under *Miranda v. Arizona*, 384 U.S. 436 (1965). It appears that they argue that the whole panoply of warnings required by that case should be applied whenever an investigation has "focussed" sufficiently to justify stopping a vehicle. They cite no authority for this novel proposition, and we see no reason to adopt it. *See Love v. United States*, 407 F.2d 1391, 1393-94 (9th Cir. 1969).

Fourth, appellants urge that there was not sufficient evidence to support their convictions. They do not challenge any of the jury instructions; the court must therefore reject their argument if there was sufficient evidence to permit the jury rationally to conclude that they were guilty beyond a reasonable doubt. *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969). There clearly was sufficient evidence to convict MacKenzie on both counts; again, as to Bondar, this appeal presents a more difficult question. To justify the conviction the prosecution needed to tie him to the marijuana found in the trunk of the Chevrolet. In addition to the evidence discussed above concerning the tandem arrangement, the jury had before it the facts that when he was stopped Bondar denied any acquaintance with MacKenzie while he had, in the glove compartment of the van he was driving, various letters

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addressed to or from MacKenzie, who resided in the same town he did. In light of this additional evidence of Bondar's consciousness of guilt, this court cannot hold that the jury could not rationally conclude that he was aware of, and participating in, the transportation of the marijuana.

Fifth, appellants argue that the trial court erred in failing to sever their trials. But they never moved for severance; while it might have been a wiser tactical decision for them to seek separate trials, it was not clear error for the trial court to fail to order such severance *sua sponte*.

Finally, appellants attack the constitutionality of prohibitions against possession and use of marijuana on the theory that such conduct is not a moral wrong but merely *malum prohibitum*. Thus, they reason, the statute must, to satisfy due process, require proof that they actually knew that possession was prohibited. This argument is frivolous since convictions under these statutes have repeatedly been affirmed.

The judgments appealed from are affirmed.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 1509 North Main Street, Santa Ana, California 92701. On , I served the within PETITION FOR WRIT OF CERTIORARI on the following:

Solicitor General of the U. S.
Department of Justice
Washington, D. C. 20530

U. S. District Court
U. S. Courthouse
312 North Spring Street
Los Angeles, Calif. 90012

United States Court of Appeals
Ninth Judicial Circuit
Seventh and Mission Streets
P. O. Box 547
San Francisco, Calif. 94101

U. S. Attorneys Office
12th Floor
312 North Spring Street
Los Angeles, Calif. 9o0012

by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Santa Ana, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on_____1975, at Santa Ana, California.

JACK GALLAGHER

Supreme Court, U. S.
FILED
JUL 14 1975
MICHAEL RODAK, JR., CLERK

No. 74-1346

In the Supreme Court of the United States

OCTOBER TERM, 1975

DUNCAN SCOTT MACKENZIE AND
RICHARD STEVEN BONDAR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence was unlawfully seized from their vehicles, that a statement made by petitioner Bondar to officers before receiving *Miranda* warnings should have been excluded from evidence, and that the application of the Controlled Substances Act to marijuana is unconstitutional.

After a jury trial in the United States District Court for the Southern District of California, petitioners were convicted of possessing and conspiring to possess 629 pounds of marijuana, in violation of 21 U.S.C. 841 (a)(1) and 846. Petitioner MacKenzie was sentenced to two years' imprisonment and petitioner Bondar was sentenced to the custody of the Attorney General under the Federal Youth Corrections Act (18 U.S.C. 5010). The court of appeals affirmed in an unpublished opinion (Pet. App.).

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. 30-32), showed that on January 25, 1974, a federal agent observed an unoccupied Chevrolet automobile parked near the Mexican border in Calexico, California, in an area frequently used by smugglers for narcotics "drops." The agent noticed that the car was fitted with heavy-duty air-suspension shock absorbers of the type commonly installed on cars used to smuggle marijuana and that despite the special shock absorbers, the vehicle was sitting low in the back and its rear tires, although new, were bulging. A dog trained to detect the scent of marijuana was brought to the scene and indicated by his reaction that the drug was present in the trunk of the car.

Federal agents undertook a surveillance of the unoccupied Chevrolet. After several hours petitioner MacKenzie got into the car and drove away on an interstate highway. The agents followed and observed that the Chevrolet was traveling in tandem with a van, a common *modus operandi* of drug smugglers. The Chevrolet and the van traveled together for some 35 miles, usually only 100 yards apart and never separated by more than a quarter of a mile. After the van had flashed its headlights several times when no traffic was approaching, as if to signal the Chevrolet, the agents stopped both vehicles.[1] Petitioner Bondar, the driver of the van, in response to the agents' inquiry, denied knowing MacKenzie. The agents searched the Chevrolet's trunk and seized 629 pounds of marijuana. The van, which was subsequently searched at DEA headquarters in Calexico, contained letters addressed to MacKenzie.

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[1]In addition to the agents following the vehicles in an automobile, another agent maintained surveillance from a small plane flying over the highway (Tr. 99). The flashing lights by the van were observed by the agent maintaining air surveillance and that fact was communicated to agents on the ground (Tr. 199).

1. Contrary to petitioners' contention, the agents were justified in searching both vehicles without obtaining search warrants. An agent observed the low sitting car with special shock absorbers parked in a notorious drug trafficking location, a trained dog signalled that there was marijuana in the trunk, and this car was then driven in tandem with a van, a common *modus operandi* of drug smugglers. These facts established probable cause for the search of the vehicle. *Carroll* v. *United States*, 267 U.S. 132.

Contrary to petitioners' contention (Pet. 17-19), a warrant was not required merely because the agents deferred a search of the car until after petitioner MacKenzie appeared and drove it away. Although petitioner MacKenzie did not appear for several hours, and in retrospect it might have been possible to secure a warrant before his arrival, it was equally likely at the time that MacKenzie would appear and drive the car away soon after the agent initially observed it. Probable cause must be determined on the facts confronting the agents at the time; hindsight is an improper criterion for evaluating the need for a warrant. See, *United States* v. *Church*, 490 F.2d 353, 354-355 (C.A. 9), certiorari denied, 416 U.S. 983. In any event, the agents were not required to secure a warrant as soon as they had obtained probable cause. See *Hoffa* v. *United States*, 385 U.S. 293, 310.

When the agents saw the van driven by petitioner Bondar proceeding in tandem with the car believed to contain a large quantity of marijuana and learned that it appeared to be signalling the other vehicle with its headlights, they had probable cause to stop and search it without a warrant in view of the possibility of flight on the open highway and the likely presence of contraband. *Carroll* v. *United States, supra*. The

court of appeals correctly held, since the officers could lawfully have searched the van without a warrant when they stopped it, they were entitled to postpone the search until the vehicle was removed to a more convenient location. *Chambers* v. *Maroney*, 399 U.S. 42. See also, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 463.

2. At trial, Agent Walker testified, over petitioner Bondar's objection, that after both vehicles were stopped, he approached petitioner Bondar, identified himself as a government agent conducting a narcotics investigation, and asked him "who his friend was in the vehicle just to the east" (Tr. 152-153). Bondar replied that he "didn't have any friend or denied any knowledge of knowing anyone in the vehicle" (*id.* at 153). Petitioner Bondar contends that the agent's testimony should have been excluded because he had not been given *Miranda* warnings prior to the inquiry.

Miranda warnings are designed to prevent the coercion that may result from a police-dominated inquisitorial atmosphere, and they are required when the person being interrogated is "in custody at the station or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U.S. 436, 477. But this Court's *Miranda* decision was not intended to preclude law enforcement officers from conducting a preliminary on-the-scene investigation to determine whether a crime had been committed or was in progress. See 384 U.S. at 477-478. The agent's inquiry to petitioner Bondar concerning his acquaintance with the driver of the vehicle that Bondar had been following was made without any indication to petitioner that he was under arrest and, in the circumstances, was a reasonable preliminary question. See *Love* v. *United States*, 407 F.2d 1391 (C.A. 9); *United States* v. *Hall*, 421 F.2d 540 (C.A. 2), certiorari denied, 397 U.S. 990.[2]

3. Finally, petitioners claim (Pet. 24-28) that their convictions for possession of 629 pounds of marijuana were unconstitutional because the Controlled Substances Act does not require, and the government failed to prove, that they knew that possession of marijuana was unlawful. They argue that since the offenses punished by the Controlled Substances Act are *malum prohibitum* rather than *malum in se*, ignorance of the law is a defense. But, as the court below correctly concluded (Pet. App. 32), due process does not require proof that petitioners knew that possession of marijuana is illegal. See *United States* v. *Balint*, 258 U.S. 250; see also *United States* v. *International Minerals Corp.*, 402 U.S. 558.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]Petitioner Bondar's suggestion (Pet. 22-24) that *Miranda* warnings were required because there was probable cause to stop and search his vehicle, and, thus, suspicion had focused on him, is insubstantial. This contention is founded on the erroneous premise that the existence of probable cause necessarily results in any police questioning being custodial interrogation. But probable cause to stop and search a vehicle does not automatically create a potentially coercive atmosphere requiring *Miranda* warnings. See *United States* v. *Hall*, *supra*, 421 F.2d at 543. Rather it is the nature of the question asked and the circumstances surrounding the inquiry that are determinative. And, as shown in the text, neither the content nor the context of the agent's question to petitioner Bondar required the giving of *Miranda* warnings.